National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 19, 1996

TO: Rosemary Pye, Regional Director, Region 1

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Indeck Energy Systems of Turners Falls, Inc., Case 1-CA-33812

596-0420-0100, 596-0465

This case was submitted for advice on whether the Section 10(b) period should be tolled for the amount of time that the Agency was shut down due to lack of appropriated funds.

On February 9, 1996, the Charging Party Union filed the instant Section 8(a)(1) charge alleging that in July 1995, the Employer threatened an employee with discharge, and discriminatorily denied that employee use of a telephone to call the Union, in retaliation against the employee's having invoked his Section 7 rights. The Region has determined that the Section 10 (b) period began around July 28, 1995. Therefore, the instant charge was filed around 12 days after the expiration of the 10(b) period.

We conclude that the Region should dismiss this charge as time barred because we would not argue that the Section 10(b) period was tolled during that period of time that the Agency was shut down for lack of funds.

On September 29, 1995, the Agency published in the Federal Register a "Notice of Procedures to be Followed in the Event Board Offices are Closed Due to Lack of Appropriated Funds."[(1)] In the Notice, the Board announced that it was granting, sua sponte:

an extension of time to file any document for which the grant of an extension of time is permitted by law. The terms of the extension are that for each day on which the agency's offices are closed for all or any portion of the day, one day shall be added to the time for filing or service of the document. *Extensions of time for filing cannot apply to the 6 month period provided by Section 10(b) of the Act* [emphasis added]...However, with respect to time computations for filing and serving charges pursuant to Section 10(b)...the Board hereby gives notice of its intention to construe the phrase "Saturday, Sunday, or a legal holiday" in its rules pertaining to filing and service, Section 102.111(a), 29 C.F.R. 102.111(a), to encompass any day on which the agency's offices are closed for all or any portion of the day due to lack of appropriated funds.

The Board's Notice applies Section 102.111(a) of the Board's rules to the 13 days during which the Agency was most recently shut down until it reopened on January 4, 1996. Section 102.111(a) provides that the last day of a computed filing period may be excluded from the computed period if such last day falls on a Saturday, Sunday, or legal holiday. According to the Board's Office of Executive Secretary, the intention of the Board's Notice was to attempt to apply this rule to the last day of the Section 10(b) period if it fell during the Agency's shutdown, or if it fell during the next 13 days after the Agency reopened on January 4. In that event, such a last day would be extended an additional 13 days.[(2)]

The instant case does not fall within the intention of the Board's Notice. The last day of the Section 10(b) period for this Charging Party did not fall during either the Agency's shutdown, or even during the following 13 days. Rather, the instant Charging Party had sufficient time before the 10(b) period ended in which to file a timely charge after the Agency had already reopened.

We conclude that it would be inappropriate to go beyond the position of the Board in this Notice and attempt to yet further toll Section 10(b) merely because the Agency was shut down at some point during the Section 10(b) period. We recognize that in

this case, but for the shutdown, the Board Agent would have timely called the Charging Party Union and informed it that during the investigation of another, earlier charge, Case 1-CA-33560(1), the agent had discovered evidence which suggested that the Employer had committed the instant violation.[(3)] In that event the Union might well have filed a timely charge. However, this evidence was available to the Charging Party Union as well as to the Region. In fact, this evidence was provided by the discriminatee, the Union's witness. The Union could have decided on its own to file a charge on this violation. Therefore, these equities do not toll the Section 10(b) period.

Accordingly, the Region should dismiss this charge as time barred.

B.J.K.

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[1] See Federal Register, Vol. 60, No. 189 (September 29, 1995).

[2] Also, the Board warned in this Notice that "the operation of Section 10(b) during an interruption in the Board's normal operations is uncertain.

[3] The Region concluded that the charge in the instant case is not "closely related" to the earlier, timely filed charge in Case 1-CA-33560(1), so that the first charge could not encompass the allegation in the instant charge. The Region based this decision on its finding that the instant charge involves a different set of facts than Case 1-CA-33560(1). The instant charge presents the issue of whether the Employer violated Section 8(a)(1) by threatening discharge and denying the alleged discriminatee the use of the phone in retaliation for his invoking his Weingarten right. Case 1-CA-33460(1) presented the issue of whether the Employer, three months later, violated the Act by suspending this same discriminatee for three days in retaliation for his invoking his Weingarten rights. (The Region decided to dismiss this suspension allegation in Case 1-CA-33560(1) because the evidence demonstrated that the Employer had decided to suspend the alleged discriminatee prior to his invoking his Weingarten rights.)